STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Kenneth Kanagy,

Appellant,

v. Case No. 2014-MIS-06-0146

Crawford County Board of Commissioners,

Appellee,

ORDER

This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the entirety of the record, including a review of the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, the Board hereby adopts the Recommendation of the Administrative Law Judge.

Wherefore, it is hereby **ORDERED** that this appeal is **DISMISSED** for lack of jurisdiction.

Casey - Aye
Lumpe - Aye
Tillery - Not Present

Terry L. Casey, *Chairman*

CERTIFICATION

The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitutes ~~(the original/a~~ true copy of the original) order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, January 08, 2015.

Clerk

NOTE: *Please see the reverse side of this Order* ***or*** *the attachment to this Order for information regarding your appeal rights.*

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

Kenneth Kanagy,	Case No. 14-MIS-06-0146
Appellant	
v.	November 24, 2014
Crawford County Board of Commissioners,	
Appellee	Jeannette E. Gunn *Administrative Law Judge*

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This matter came on for consideration upon Appellant's June 23, 2014, filing of an appeal with this Board. Appellant raised two issues in his appeal, his removal from employment (SPBR Case No. 14-REM-06-0145), and Appellee's alleged imposition of retaliatory discipline, which is considered herein.

This Board has jurisdiction to consider retaliatory discipline arising pursuant to the report of violations of state or federal statutes, rules, or regulations; the misuse of public resources, or OSHA violations. See, R.C. 124.341, 4167.13. In the case at hand, Appellant failed to specify the statute under which he claimed protection from retaliatory discipline. Therefore, in order to supplement the record regarding Appellant's allegations of retaliatory discipline, the Board issued a Procedural Order and Questionnaire on October 2, 2014. Appellant responded to the Procedural Order and Questionnaire on October 15, 2014; Appellee filed a Motion to Dismiss with this Board on November 4, 2014.

In an appeal of retaliatory discipline, the employee bears the burden to prove, by a preponderance of the evidence, that the disciplinary or retaliatory action taken by the employee's appointing authority resulted from of protected actions taken by the employee. Case law has established that the framework for the order and presentation of evidence first articulated by the United States Supreme Court in *McDonnell Douglas v. Green* (1973), 411 U.S. 792, is appropriate in a whistleblower appeal brought under R.C. 124.341. See, *Mark Leslie v. Ohio Department of Development* (2006), Franklin County No. 05CVF-05-4401, unreported.

An employee must first establish a *prima facie* case to support his or her claim. The burden of production then shifts to the appointing authority to rebut the employee's evidence by articulating a legitimate, non-retaliatory reason for its employment decision. If the appointing authority satisfies that burden of production, the burden of persuasion shifts to the employee to prove that the appointing authority's stated reason is a pretext for retaliation.

Upon a review of the information contained in the record, I find that Appellant failed to demonstrate that he complied with the reporting requirements of either R.C. 124.341(A) or 4167.13, which would entitle him to protection under those sections of the Ohio Revised Code.

In order to establish entitlement to protection under R.C. 124.341, an employee in the classified or unclassified civil service must demonstrate that he or she filed a written report with his or her supervisor or other individual named in the statute identifying an alleged violation of state or federal statutes, rules or regulations, or the misuse of public resources. Appellant provided this Board with copies of departmental grievances regarding sick leave usage and time calculation. The most recent of these bears the date of March 24, 2014. The grievance forms provided by Appellant reference a departmental policy manual but do not otherwise identify any violation of state or federal statutes, rules or regulations, or a misuse of public resources to which Appellee could reasonably be required to respond. Accordingly, I find that Appellant has failed to demonstrate a *prima facie* case to support his claim to protection under R.C. 124.341(A).

Even assuming, *arguendo*, that Appellant had demonstrated compliance with the reporting requirements of R.C. 124.341(A), I find that his appeal was not filed in timely manner. O.A.C. 124-1-03 requires that appeals from disciplinary or retaliatory actions taken as a result of whistleblower activities arising under R.C. 124.341(A) must be filed with this Board within thirty days of receiving notice of the disciplinary or retaliatory action. Appellant indicated in his response to this Board's October 2, 2014, Questionnaire that the latest date on which he had received notice of the retaliatory actions from which he had appealed was April 28, 2014. His appeal was filed with this Board on June 23, 2014, well outside the thirty day time limit.

In order to establish entitlement to protection under R.C. 4167.13, a public employee must demonstrate that he or she filed a complaint or instituted a proceeding related to R.C. Chapter 4167., testified or was about to testify in any proceeding, or exercised a right afforded by R.C. Chapter 4167. Appellant provided no information to demonstrate compliance with any of these qualifying conditions. Therefore, I find that Appellant has failed to demonstrate a *prima facie* case to support a claim to protection under R.C. 4167.13.

Accordingly, upon a review of all of the information contained in the record I find that Appellant has failed to establish a prima facie case of retaliatory discipline under either R.C. 124.341(A) or R.C. 4167.13. I further find that Appellant's appeal was untimely as an appeal of retaliatory discipline arising under R.C. 124.341(A). Therefore, I respectfully **RECOMMEND** that this appeal be **DISMISSED** for lack of jurisdiction. I note that Appellant has filed a timely appeal of the merits of his removal; this matter will go forward independent of the conclusion of the instant appeal.

Jeannette E. Gunn
Administrative Law Judge